Presentation by Gerry Cohen
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OVERVIEW OF JUDICIAL REDISTRICTING

To borrow an analogy, Judicial Redistricting may be to Redistricting the same way as Military Music is to Music. Much of the outline is the same as you may be familiar with from Legislative and Congressional Districting, but some of it (such as dividing up a county into separate judicial districts) is more analogous to redoing a county board of commissioners or city council.

As I will discuss:

1. The history of the court system in North Carolina can guide us in understanding the complexities of the judicial system in North Carolina.
2. One-person one-vote does not apply in the same way it does for other elections.
3. Section 2 of the Voting Rights Act of 1965 applies to the process, including issues relating to the racial composition of districts, the form of election itself, and potentially racial differences in the implementation of a transition to new districts or double-bunking of incumbents. The current system enacted in 1987 of dividing counties to create superior court electoral districts arose out of settlement of a Section 2 case filed in 1986 by the Black Lawyers Association.
4. The General Assembly is free "from time to time to divide the State into a convenient number of superior court and district court districts" (Article IV, Sections 9 and 10).
5. The State Constitutional provision in Article VI, Sections 6 and 8 that have been historically construed to bar the General Assembly from adding additional qualifications to candidates might impact the expansion of "residency districts" that appear in the latest version of House Bill 717.
6. The Wisconsin legislative redistricting case on partisan gerrymandering that was argued before the United States Supreme Court may impact this process.

HISTORY OF THE COURT SYSTEM

While the Superior Court has always been a state court system, prior to the 1962 Constitutional Amendment unifying the state court system that rose out of the Bell Commission in 1958 what is now the District Court system was a hodge-podge of 256 different courts, with differing jurisdiction, different forms of selection of the "judge", and all funding at the local level. The 1962 amendment abolished all the local courts in favor of the state-funded District Court and barred

the General Assembly from creating any new courts. This was implemented in the 1966, 1968, and 1970 elections.

Indeed a 1958 special issue of Popular Government (the School of Government's periodical series) that covered the general trial courts spent 17 pages just discussing the different forms of local courts: county courts, recorders courts, justice of the peace (JP) courts, and special courts dealing with issues like juvenile justice. The JP courts were presided over by JPs who themselves were chosen by three different methods. In some counties the superior court judge chose the JPs, in some counties the JPs were appointed directly by the General Assembly in an omnibus bill, and in some counties the JPs were chosen by the county commissioners. A large number of municipalities had Recorders Courts that handle traffic cases and other minor misdemeanors. The manner of choosing the Recorder (an English word meaning municipal or borough judge) varied from town to town. In the late 1960s for example, Charlotte's recorder and recorders court prosecuting attorney were appointed by the city council, while in Chapel Hill the recorder was elected while the then board of aldermen appointed the prosecutor. I remember attending a Chapel Hill Recorders Court trial in the late 1960s, it was a far different environment than the District Court that replaced it in 1971.

The electoral system for Superior Court was very simple until the mid-1950s as each Superior Court had but one judge. When a second judge was added for the superior court for Mecklenburg County in 1956, a decision was made by the General Assembly that in any multi-seat superior court district if judges terms expired at the same time then it would be treated as a multi-seat race (e.g "vote for not more than 2,") rather than the "numbered post" system when multiple Supreme Court seats were up at the same election. The electoral system for the Court of Appeals and the District Courts when they were established followed the Supreme Court model where candidates file for a particular seat in a head-to-head race.

ONE-PERSON ONE-VOTE

The United States Supreme Court has never directly held that judges are subject to the one-person one-vote doctrine that applies to congressional, legislative, and local govern board redistricting, holding in the 1991 Chisom v Roemer case (501 US 380) that judges do not represent people and thus the principle does not apply. While I remember from drafting the 1989 superior court redistricting that urban counties such as Wake or Mecklenburg had rough proportionality based on the 1980 census (with probably a 25% deviation), the districts were NOT changed in either 1991 or 2001, and in the case of Mecklenburg not changed in 2011. By the time the North Carolina Supreme Court held in 2009 in Blankenship v Bartlett (363 NC 518) held that one-person one-vote had SOME application, the districts in Wake County varied from one judge per 32,000 in one district to one judge per 123,000, a 4:1 disparity.

The North Carolina Supreme Court holding in Blankenship was that the Equal Protection Provisions of Article I, Section 19 of the North Carolina Constitution applied to judicial redistricting. (This issue arises only in a districts divided into sub districts, not BETWEEN judicial districts) The court held that while the principle of strict scrutiny that led to the +/-5% population deviation for other types of redistricting does not apply to judges, the court applied what it called "Intermediate Scrutiny" whereby larger judicial district deviations are allowed. The court said that Intermediate Scrutiny was a test to balance important governmental interests and does not place a substantial burden. The court held that "judicial districts will be sustained if the legislature's formulations advance important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary" and that the plaintiffs must make a "prima facie showing of considerable disparity between similarly situated districts in order to trigger constitutional review". The court then held that the 4:1 disparity in Wake County (District 10) violated the NC Constitution and that in future cases plaintiffs must demonstrate a disparity in voting power approaching the number struck down in Wake County. It is my understanding that the current districts in Mecklenburg County well exceed this bright line and would be required to be re-drawn.

The disparities occur in these urban counties because of minimal growth in the district that had been created in 1989 in order to allow Black voters to elect a candidate of choice, and very large gains in suburban districts largely due to in-migration.

The General Assembly is of course free to apply the +/-5% standard that applies in other types of districting.

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES

In late 1986 the Black Lawyers Association brought suit against North Carolina, alleging that the county wide system of electing superior court judges in Wake, Durham, Mecklenburg, Cumberland, Forsyth, Guilford, Nash, Edgecombe and Wilson Counties violated Section 2 of the Voting Rights Act of 1965, These same counties had been broken up in legislative redistricting by the 1986 US Supreme Court case of Thornburg v Gingles. (478 US 300).

Section 2 states simply that "No voting qualification or pre-requisite to voting shall be imposed or applied by a state which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."

This principle was used in Gingles by use of a three-prong test to look at each at-large district: 1) The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-

member district; 2) The minority group must show it is politically cohesive; and 3) The white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate.

Since the issues in those counties for superior court on those issues of vote dilution were substantially similar to those for the legislative elections, the General Assembly chose to settle the case with the passage of Chapter 509 of the Session Laws of 1987 which I drafted and drew the districts for. There was never a district court opinion in the Black Lawyer's case since it was settled.

The districting of those counties in 1987 was done without any double-bunking of incumbent elected superior court judges by converting seven special superior court judges to regular superior court judges. In most cases the new vacant seats were in districts that were majority-minority or nearly so. Those special judgeships were abolished leading to no net cost in creating the new elective judges.

There are other Section 2 issues that might arise, based on the composition of the districts themselves and the jurisprudence that has developed since 1989. The extent to which race was taken into consideration in creating new districts, whether black voters are packed into districts that are far more than needed or whether black communities were cracked are all issues currently being faced in the 2010 round of redistricting litigation in North Carolina. I have not examined the districts in House Bill 717 at any level of detail and have no current opinion on whether they could be subject to successful Section 2 litigation. It is also possibly that a re-examination of the current and proposed districts might find that the three Gingles factors no longer apply. I would note that reports that a significantly higher percentage of incumbent black superior and district court judges are double-bunked than are white judges might also trigger litigation in Section 2.

The system of election being used can also affect Section 2 litigation. In 1987 all judges were elected on a partisan basis, were converted to nonpartisan a decade later, then in 2017 were briefly restored to partisan before a nonpartisan system was restored in a later law for 2018 but with the party of the candidate appearing on the ballot next to the candidate's name. The significance here is that in many areas, partisan election might make it easier for minority candidates to succeed, especially in urban areas. Since over 90% of blacks affiliate as Democrats, adistrict might be 40% black, but in a Democratic primary 60% of the voters might be black, leading to a greater likelihood for a black nominee to be a party nominee in an area where there are significant numbers of white Democratic voters who will vote for their party in the general election (so called "cross-over" voters).

GENERAL ASSEMBLY FREE FROM TIME TO TIME TO CHANGE DISTRICTS

Unlike legislative redistricting that the Constitution forbids from being done more than once in a decade, Article IV states that the General Assembly may "…from time to time to divide the State into a convenient number of superior court and district court districts." The North Carolina Supreme Court in 1989 Martin v Preston (325 NC 438) upheld the provisions of Chapter 509 of the 1989 Session Laws that had enhanced the transition to a new system of districts by postponing elections in some new districts for 2 and even 4 years, allowing the prior judge to hold over as allowed by the Constitution. This was done because part of the settlement of the Black Lawyers Association case was to end the practice of staggered terms in electing superior court judges, providing that in any given district all superior court judges would come up at the same time, allowing a minority to use single-shot voting in a multi-seat race to enhance the likelihood of success. The Martin v Preston court said they found "… any benefit to the incumbent judges to be incidental and subordinate to the legitimate public benefits obtained by delaying elections for certain superior court judges." This public purpose doctrine might insulate any potential changes in election dates in House Bill 717 depending on the factual circumstances. I only briefly looked at the transition provisions in HB717.

RESIDENCY DISTRICTS

Currently, there are four multi-county district court districts that require specific seats to be reserved for judges who reside in a specific county or counties within the districts, but with all the voters of the district electing all judges. These so-called "residency districts" are also found in 20 or so of 100 counties for boards of commissioners as well as 31 of 541 municipal governing boards. House Bill 717 proposes to expand residency districts to seven superior court districts and a new total of 12 district court districts.

I have some concern about whether the provision of Article VI, Sections 6 and 8 of the North Carolina Constitution allow residence districts. Section states that "Every qualified voter who is 21 years of age, except as in this constitution disqualified shall be eligible for election by the people." Section 8 states that a person is disqualified from running if they are "not qualified to vote in an election for that office" (There are other constitutional disqualification such as felony conviction, or in the case of judges not being licensed to practice law)

The North Carolina Supreme Court has repeatedly said that the General Assembly may not by statute add any further qualifications to hold office. In Spruill v Bateman (162 NC 588 (1913)) the court voided a statutory requirement that judges be attorneys, a decision reversed by a later constitutional amendment, Moore v Knightdale Board of Elections barred the General Assembly from requiring a candidate to resign from one office before running for another (so called "resign-to-run).

If the General Assembly creates a three-county district court district, in which the voters in all three counties vote on all the seats, but a candidate has to reside in a specific county of those three to run for a particular seat, it appears to me that the General Assembly has added an additional qualification that prevents lawyers in some counties from filing from some of the seats that they are eligible to vote for. I know that about 10 years ago a candidate filed a poorly-researched lawsuit against a municipal residency district requirement which was eventually dismissed, but I think this is an issue still lurking.

PARTISAN GERRYMANDERING

There have been some arguments that House Bill 717 is a partisan gerrymander. Court have set a very high bar to such litigation, but a Wisconsin legislative redistricting case recently argued before the US Supreme Court might open the door to proving claims of an unconstitutional partisan gerrymander. A 3-judge federal district court heard a similar case against the North Carolina congressional redistricting plan. Both these cases are worth watching for potential applicability.